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Technical Bulletins: Accommodating Nursing Mothers in the Workplace (2011)

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September 7, 2011

ACCOMMODATING NURSING MOTHERS IN THE WORKPLACE

Bonnie Jones, Human Resource Consultant

Effective July 31, 2011, the Tennessee legislature passed Chapter No. 91 (HB0871/ SB0083), which removes the age limit on children who can be breast-fed in public. This statute amends T.C.A. §§ 39-13-511 and 68-58-101 by removing the current 12-month age limit on children who can be legally breast-fed publicly. This does not change the federal law passed in 2010 that was part of health care reform.

On March 23, 2010, a new federal law was passed that requires employers to accommodate nursing mothers in the workplace. In addition to federal law, there are state laws to which your municipality should be adhering. This publication will guide you through state and federal laws that accommodate nursing mothers in the workplace. It also will provide information on employer best practices and frequently asked questions.

According to the Centers for Disease Control (CDC), mothers are the fastest-growing segment of the United States workforce. The CDC shows that 70 percent of employed mothers with children younger than three years of age work full time. One-third of these mothers return to work within three months of the child's birth. Unlike the 1950s, 1960s and early 1970s more new parents are choosing to breast-feed and are doing so for a myriad of reasons, primarily the well-documented health benefits, bonding and cost.

HEALTH BENEFITS FOR THE FAMILY

Breast milk contains antibodies that protect the baby from illnesses including: gastrointestinal disease, respiratory infections, asthma, obesity, type I and type II diabetes and childhood leukemia. In addition to the benefits breast-feeding offers babies, it offers mothers a reduction in risk for type II diabetes, breast cancer, ovarian cancer and postpartum depression. A healthier baby and mom means both parents can be at work and productive, which seems like a welcome benefit for the employer.¹ Additionally, in 2011 the Health and Human Services Department released a report showing researchers believe that breast-feeding may be particularly beneficial to mothers who have survived childhood cancer. (Source HHS HealthBeat, February 21, 2011.)

BREAST-FEEDING REPORT CARD

Initial breast-feeding is at its most prevalent level since the introduction of formula with three out of four mothers currently breast-feeding from birth. The medical community overwhelmingly endorses breast-feeding for better health of infants and mothers. Disappointing, however, is that the actual rate of breast-feeding after three, six and nine months remains very low. Tennessee ranks among the lowest in the nation with the percentage of children who are still breast-fed at six months being less than 30 percent. Data shows us that breast-feeding is almost always the healthiest choice for moms and babies, yet we remain one of the lowest on the CDC

¹<http://www.womenshealth.gov/breastfeeding/why-breastfeeding-is-important/>

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report card. (Source CDC, 2010). For working mothers the reason may be in part due to workplaces having inadequate support for breast-feeding families. Here is a link to the 2010 breast-feeding report card by state: www.cdc.gov/breast-feeding/data/reportcard.htm.

Mothers who choose to breast-feed face significant challenges when returning to work after the birth of a child. The commitment to feed a child breast milk requires working mothers to express breast milk at regular intervals throughout the day and properly store the milk for the baby's consumption. This is generally done with an electric pump that can be carried in a simple backpack. Expressing milk at work can be particularly challenging for mothers who travel or have limited opportunities to express milk while at work. Women who don't have adequate milk expressing options may often consider taking longer leaves, reducing their hours or even quitting their jobs. An employer can maximize the opportunity for a smooth transition back to work by providing an environment that supports breast-feeding mothers.

IT IS NOT JUST GOOD POLICY, IT IS THE LAW

Effective March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act (PPCA) that includes a provision for nursing mothers in the workplace. Most employers were not aware of the new provision because the new health care legislation is more than 2,000 pages long. The new regulations amended Section 7 of the Fair Labor Standards Act that provides new requirements for employers to accommodate nursing mothers. The new requirements state that "employers are required to provide reasonable break time for an employee to express breast milk for her nursing child for one year

after the child's birth each time the employee has a need to express breast milk."

These changes to the Fair Labor Standards Act (FLSA) apply to non-exempt employees, which are employees who are exempt under section 213 of FLSA and meet the executive, administrative, professional, outside sales or computer professional exemptions.

STATE LAW

The FLSA requirement does not pre-empt state laws that may provide greater protections to employees (i.e., providing break time beyond one year after the child's birth). Since Tennessee state law does not specify an infant's age limitation, employees are permitted to express breast milk for as long as they are breast-feeding their child. Absent the state law, nursing mothers would only have protection for up to one year after the child's birth.

In addition, the Tennessee state law applies to exempt employees as well as non-exempt employees. This means exempt and non-exempt employees shall be provided reasonable break time for the purpose of expressing milk.

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EMPLOYERS WITH FEWER THAN 50 EMPLOYEES

Employers with less than 50 employees are not subject to the FLSA break time requirement if the breaks would pose an undue hardship on the employer. Undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size of the employer. All employees, regardless of work site, are counted when determining whether the exemption may apply. The Department of Labor is expected to provide additional guidance on this exemption.

EMPLOYERS WITH 50 OR MORE EMPLOYEES

Employers with 50 or more employees must comply with the regulation, regardless of hardship. All work sites and employee statuses are counted for purposes of employee count. This differs from T.C.A. § 50-1-305 (1999), which allowed Tennessee employers of all sizes to opt out if the breaks created an undue hardship on the employer.

TENNESSEE LEGISLATIVE HISTORY

In 1999, the Tennessee legislature passed T.C.A. § 50-1-305 that requires Tennessee employers to provide daily unpaid break time for a mother to express breast milk for her infant child. When possible, the break time should run concurrently with any break time already provided to the employee. In addition, there was an exemption to the law if the practice unduly disrupts the operations of the employer. (Note: this exemption now only applies to employers with fewer than 50 employees.) The law also stated that the employer should make reasonable efforts to provide a room, other than a bathroom, where the employee could express milk in close proximity to the work area.

In 2006, the Tennessee legislature passed T.C.A. § 68-58-101 *et seq.* that permits a mother to breast-feed an infant, 12 months or younger, in any location public or private, that the mother is authorized to be, and prohibits local governments from criminalizing or restricting breast-feeding. In addition, the law specifies that the act of breast-feeding shall not be considered public indecency, nudity, sexual in nature or obscene.

In 2011, the Tennessee legislature removed the age limit on breast-feeding in public. Amends T.C.A. §§ 39-13-511 and 68-58-101.

SPACE

A bathroom, even if private, is not an acceptable location under the law. The employer must provide a space that is functional for expressing breast milk. A clean small office with electricity, a light, chair and a locked door is an appropriate space. The space can also be converted into a nursing room on an as-needed basis as long as it is available on demand. The space must be shielded from view and free from any intrusion of co-workers or the public. Nursing equipment can be somewhat noisy, so a closed office space is recommended.

DURATION OF BREAKS

The legislation specifically states that the duration and frequency of breaks will vary. Each mother will need a different duration and frequency. In addition, women are biologically programmed to express as much milk as their growing child needs at that time which constantly varies from birth. This means that your employees may need differing durations

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depending on stage of child's development and the mother's needs. In addition to expressing milk, there is the sanitation of the equipment, storage of the milk and washing hands that should be factored into these break times.

COMPENSATION FOR NON-EXEMPT EMPLOYEES

State and federal laws do not require nursing breaks to be paid. Your city cannot limit the number of breaks an employee takes to express milk, but your city can elect to designate the nursing breaks as unpaid. However, if an employer provides regular break times, FLSA requires that all employees be paid for those breaks. Hence, nursing mothers are free to use these break times for expressing milk.

Aside from the amendment to the PPACA, there is no state or federal law that requires Tennessee municipalities to offer break times. Tennessee employers are required to provide a 30-minute rest period for those employees scheduled to work six consecutive hours, except in positions where the nature of the business allows for ample opportunity to rest or take applicable breaks. If an employer chooses to provide non-meal break(s), the break(s) if 20 minutes or less in duration must be paid.

EXEMPT EMPLOYEES

Tennessee state law provides that exempt employees be provided break times to express milk. It is generally not recommended to dock salaried exempt employees' pay because salary is not based on number of hours worked per day but on a per job basis.

NON-TRADITIONAL POSITIONS

How will an employee who drives a patrol car express breast milk? While it seems difficult, many employees

in non-traditional office positions nurse their children. If the employee works in a non-traditional office setting; your city should have dialogue with the employee to make sure she feels comfortable with her options for expressing breast milk. This may require the employer to be flexible and to educate co-workers on the accommodation to ensure proper personnel coverage at all times.

In summary, the benefits to having breast-fed children are not just good for the employer and employee, but a healthier society for everyone and for workplaces that respect the needs of growing families.

BEST PRACTICES

So, after wading through the state and federal laws regarding nursing mothers, how can you make your workplace family friendly?

HERE ARE SOME TIPS:

- Provide educational materials for all employees;
- Provide training for supervisors and management;
- Have a nursing mothers workplace policy that is visible to all employees;
- Have an accessible, private, clean space with appropriate signage, electricity, a locked door and comfortable chair designated for nursing mothers. Be flexible with work schedules to provide time for nursing;
- Ensure a sink for proper sanitizing is nearby for washing hands and sanitizing equipment;
- Allow the nursing parent access to hygienic storage options (refrigerator) for secure milk storage;
- Have continuous dialogue with expectant mothers and new parents; and
- Survey employees about family friendly work policies.

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FREQUENTLY ASKED QUESTIONS

Q: My employee is required to travel frequently as part of her job. Should I recommend she consider formula feeding?

A: Absolutely not. The choice to formula feed vs. breast-feed is an intensely personal and important decision for parents. As an employer, you should find ways to encourage, not discourage making breast-feeding work, after all it is a temporary circumstance and your city's family friendly policies will go a long way in making your employees happier and more productive. Most importantly, breast-feeding promotes a healthier mom and baby, which means your employee (including dads) will likely be a much more productive and miss less work as a result of positive family-friendly policies.

Additionally, for those not familiar with breast-feeding, there are multiple electronic options for expressing milk that can be done in vehicles, airports, hotels, outdoors and almost anywhere an employee will go. While not fun or easy, it is certainly done every day by millions of women who have committed to breast-feeding their children and balancing a career.

Q: Am I required to eliminate travel from my nursing employee's schedule?

A: No. However, if travel is able to be modified without an undue hardship on the employer, you should consider working with the nursing mother to limit overnight or excessive travel while nursing. For some nursing mothers, travel will be feasible, for others it might be more difficult. Have the dialogue with the employee to determine what the best course of action is.

Q: Can we require the nursing mother to use her normal breaks to nurse?

A: While you cannot require your employee to forgo regular breaks (if provided to other employees), Tennessee state law says you can require the nursing mom to take them back-to-back, which provides for less interruption and only one period away from the workstation rather than two.

Q: What is considered excessive under the new regulations?

A: This is not defined in the regulations and it is important to note every nursing mother will have different needs as their baby's needs change. That nursing breaks are generally unpaid will likely serve as an incentive for employees to express milk efficiently and report back to work.

Q: How do I keep track of nursing breaks?

A: This is up to the employer to track on a per employee basis. If you provide breaks to all employees, you should not count nursing breaks as a regular break, because employees cannot be required to use their regularly provided breaks for nursing.

Q: Can I require nursing moms to sign in and out of a room for nursing breaks?

A: Yes. Some employers have a designated nursing room and employees sign in and out of the space through a central human resources office. This allows a central place for the storage of the key and ensures that the room is not used for other purposes that may prevent or impede a nursing mother from expressing milk.

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Q: We have no space available to create a nursing room. Can I allow the employee to use my office until we make other arrangements?

A: Yes, but this means your office needs to be available whenever the employee needs to express milk.

However, if you are required by law to provide space for your nursing mothers, it is advisable you work on a solution such as moving as soon as your lease agreement or rental agreement is up. If this is not a feasible solution, you may want to consider allowing the employee to work remotely until adequate nursing space is available. Another option would be to convert someone's office into a nursing room and move the employee in the office into another space.

Q: Is our city required to provide a refrigerator or freezer for the storage of expressed breast milk?

A: No. At this point, the legislation does not require an employer to provide a storage unit such as a refrigerator or freezer for the storage of breast milk. However, if your city can provide such an accommodation, it would go a long way in making nursing easier for families.

HELPFUL LINKS

Article MTAS contributed to: www.ama-assn.org/amednews/m/2011/05/16/bca0516.htm

The DOL fact sheet on nursing mothers can be found here: www.dol.gov/whd/regs/compliance/whdfs73.htm

Breast-feeding Report Card by the CDC: <http://www.cdc.gov/breastfeeding/data/reportcardreportcard2010.htm>

Support for Breast-feeding in the Workplace: http://www.cdc.gov/breastfeeding/pdf/BF_guide_2.pdf

Breast-feeding and Cancer (2011): www.hhs.gov/news/healthbeat/2011/02/20110221a.html

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